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IN THE

Supreme Court of the United States

COUNCIL TREE INVESTORS, INC., BETHEL NATIVE CORPORATION, AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* ANTARES HOLDING, LLC, *ET AL.* IN SUPPORT OF PETITIONERS

(Additional *Amici* Listed on Inside Cover)

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COMPLETE *AMICI CURIAE*

Antares Holding, LLC
Business Intelligence Solutions
Brian O'Reilly
Dempster Group, LLC
Faithfone Wireless, Inc.
Gilbert H. Scott, Sr.
Kinex Networking Solutions, Inc.
Rocking "R" International, Inc.

Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice
Benton Foundation
Media Access Project
Media Alliance
National Association for the Advancement of Colored People ("NAACP")
National Association of Multicultural Digital Entrepreneurs
National Hispanic Media Coalition ("NHMC")
National Indian Telecommunications Institute ("NITI")
National Organization for Women Foundation ("NOW Foundation")
National Urban League
Office of Communication of the United Church of Christ, Inc. ("UCC")
Public Knowledge
Rainbow PUSH Coalition
Women's Institute for Freedom of the Press ("WIFP").

QUESTION PRESENTED

Whether a reviewing court has the discretion under Section 706 of the Administrative Procedure Act ("APA") to decline to set aside, or provide any remedy for, unlawful agency action?

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INTEREST OF *AMICI CURIAE*

Amici consist of two groups[1] both of whose interests are set forth herein and have been directly and adversely impacted by the Federal Communications Commission's (the "FCC" or the "Commission") unlawful implementation of final rules that dramatically altered the rules governing designated entities ("DEs"). The New DE Rules were implemented immediately prior to the largest electromagnetic spectrum auctions in the history of the United States to the substantial detriment of the *Amici*. The Third Circuit recognized and acknowledged this detriment yet failed to appropriate an adequate remedy to make whole DEs that relied on the DE rules to effectively compete and participate in those auctions.

The first group of *Amici* is comprised of DEs who desire to participate in spectrum auctions as Congress intended as vital players contributing to wireless competition and the dissemination of licenses to a wide variety of applicants, as well as an individual with experience advising DEs on financing matters ("DE *Amici*"). This group was denied the opportunity to bid at the spectrum auctions that were

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amici* represent that counsel of record for all parties received timely notice of the intent to file this brief and all parties have provided written consent. A letter from the Petitioners reflecting their global consent to the filing of *amicus curiae* briefs is on file with the Clerk of the Court. No counsel for any party has authored any portion of this brief, nor has any person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

devastated by the last-minute rule changes and has not been provided any other form of redress or remedy despite the Third Circuit's agreement that DEs were indeed harmed by the rule changes.

The second group of *Amici* includes civil rights, public interest, and minority and women's groups ("Public Interest *Amici*"), that support the use of public airwaves in a manner that encourages participation from diverse groups traditionally locked out from owning a share of wireless spectrum, a public asset. Many among the Public Interest *Amici* represent the interests of the underserved minority communities on which DEs often focus because of the challenges of penetrating the wireless market that is dominated by a few brands. Therefore, it is in the interest of Public Interest *Amici* that their constituencies and members are not negatively impacted by decisions that foreclose opportunities to DEs and limit their options to benefit from a vibrant and competitive wireless market.

Both the DE and Public Interest *Amici* encourage invalidation of the tainted auctions conducted under the unlawful New DE Rules. In addition, *Amici* expressly and respectfully request that the Court grant Petitioners' plea for certiorari.

The DE *Amici*:

Antares Holding, LLC, was unsuccessful in its participation in Auction 66 under the New DE Rules and decided to pass on participating in Auction 73 altogether. The owner of Antares had previously founded a successful DE, Northcoast Communications, LLC, which under the old DE rules

won approximately $230 million of PCS licenses in FCC Auctions 11 and 35. Northcoast subsequently built out its markets and operated a new wireless business in three Ohio markets (Cleveland, Youngstown, and Canton), providing wireless service to approximately 80,000 subscribers.

Business Intelligence Solutions is a minority and military veteran-owned management and technology consulting firm. Business Intelligence Solutions applied to participate in Auction 73 as a DE but ultimately did not bid because of the negative impact of the FCC's new DE restrictions on its business plan.

Brian O'Reilly is a private investor with extensive wireless industry experience, including a career as an investment banker advising and raising capital for some of the leading independent wireless carriers and DEs.

Dempster Group, LLC is an investment firm with a history of developing investment opportunities in small to mid-sized businesses, including those in the telecommunications sector. The Dempster Group applied to participate in Auction 66 as a DE but ultimately did not participate due to the impact of the new DE restrictions on this investment opportunity.

Faithfone Wireless, Inc. is a small business DE that filed an application to participate in Auction 73 with the objective of acquiring spectrum to deploy an innovative new service combining mobile telephony with faith and family content. Faithfone was not able to complete the application process for Auction 73.

Gilbert H. Scott, Sr. is the former Owner and CEO of OVTC Inc., a minority-owned small business DE that filed an application to participate in Auction 66, but did not ultimately qualify to bid in that auction due to difficulty obtaining financing.

Kinex Networking Solutions, Inc. is a small business DE that provides wireless and telecom services to business and residential customers. Kinex qualified as a bidder in Auction 73, but was unsuccessful in obtaining any licenses.

Rocking "R" International, Inc. is a subcontractor for the installation of satellite broadcasting and data systems serving rural areas of the Eastern United States. Rocking "R" International applied to participate in Auction 66 as a DE but did not ultimately bid in that auction due to difficulty raising capital because of the FCC's new DE restrictions.

The Public Interest *Amici* include:

Asian American Justice Center ("AAJC"), a member of the Asian American Center for Advancing Justice, is a national nonprofit, nonpartisan organization whose goal is to advance the civil and human rights of Asian Americans. It works in conjunction with its affiliates to provide legal public policy, advocacy, and community education on issues of discrimination that affect its constituents.

The Benton Foundation's mission is to articulate a public interest vision for the digital age and to demonstrate the value of communications for solving social problems. Established in 1981, it is concerned with the use of communications media on democracy and the public interest.

Media Access Project is a 38 year-old non-profit public interest telecommunications law firm which represents the interests of civil rights, civil liberties, consumer, religious and other organizations seeking, inter alia, to promote diversity in media and telecommunications industry. MAP has actively participated in FCC proceedings relating to the design and implementation of spectrum auctions.

Media Alliance is a 32-year old media advocacy group that works for an accountable and accessible media system. Its mission is to promote excellence, ethics, diversity, and accountability in all aspects of the media in the interests of peace, justice, and social responsibility.

National Association for the Advancement of Colored People ("NAACP") is the country's oldest civil rights organization. Founded in 1909, its core mission is to promote equality of rights, eradicate caste and racial prejudice among citizens of the United States, and secure for African Americans and other minorities increased opportunities in society.

National Association of Multicultural Digital Entrepreneurs ("NAMDE") is a one-of-a-kind Washington, D.C.-based trade association which advocates for, unites and promotes the interests of diverse companies, organizations, individuals and entities within the technology and broadband market industries.

National Hispanic Media Coalition ("NHMC") is a media advocacy organization established in 1986. Its goals include advocacy for media and telecommunications policies that benefit the Latino

community and increase opportunities for American Latinos in all facets of the media industry.

National Indian Telecommunications Institute ("NITI") is founded and operated by Native Americans. NITI is dedicated to opening channels for American Indians, Native Hawaiians, and Alaskan Native communities to present their own literary, artistic and educational contents in the media.

The National Organization for Women Foundation ("NOW Foundation") is the advocacy, education and litigation arm of NOW, the nation's largest feminist activist organization, devoted to empowering women and furthering women's rights and opportunities.

The National Urban League is a historic civil rights organization dedicated to economic empowerment in order to elevate the standard of living in historically underserved urban communities. Founded in 1910 and headquartered in New York City, the National Urban League spearheads the efforts of its local affiliates through the development of programs, public policy research and advocacy. Today, there are more than 100 local affiliates in 36 states and the District of Columbia, providing direct services that impact and improve the lives of more than 2 million people nationwide.

The Office of Communication of the United Church of Christ, Inc. ("UCC") has been at the forefront of media access issues for more than 40 years. It works to assure a just and equitable media that gives meaningful voice to diverse peoples, cultures and ideas.

Public Knowledge is a Washington, D.C.-based public interest group working to defend citizens' rights in the emerging digital culture.

Rainbow PUSH Coalition ("Rainbow PUSH") is a progressive advocacy group that works to ensure workers, women and people of color have access to opportunities. It also pursues social justice, civil rights and political activism among its constituent groups.

Women's Institute for Freedom of the Press ("WIFP") was established in 1972 as a research, education and publishing organization. It seeks to increase the role of women in the media by expanding freedom of the press, to enable all of society to have equal opportunities to present their views and concerns through a democratic process.

SUMMARY OF THE ARGUMENT

This case raises important questions concerning the remedy required by Section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 when a court finds that a federal agency has acted unlawfully. The Third Circuit's decision adds to a deep and historic division of authority within the circuits.

The combination of the New DE 50% Rule[2] and the Ten-Year Hold Rule[3] has abruptly destabilized the very business model favored by DEs, and, consequently, strangled their access to sustaining capital necessary to compete for spectrum licenses.

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[2] 47 C.F.R. § 1.2110(b)(3)(IV)(A) (2006) (now vacated)

[3] *Id.* § 1.2111(d)(2)(i) (now vacated).

As a result, the wireless industry has moved farther down the path of consolidated ownership among a few large entities in a marketplace that now, for all intents and purposes, excludes diverse owners and participants. In fact, the FCC itself decided for the first time in 2010 against ruling that there is effective competition in the wireless industry, instead taking a neutral stance.[4] The New DE Rules run directly and unambiguously contrary to Congress's unmistakable intent that the FCC devise spectrum auctions in a way that encourages involvement of DEs, including small businesses. As determined by the Third Circuit Court of Appeals, the New DE Rules are contrary to law.

While DE and Public Interest *Amici* applaud the Third Circuit's decision to vacate the Commission's seriously flawed and hastily implemented 50% and Ten-Year Hold Rules, *Amici* are concerned about the failure of the court of appeals to provide relief to Petitioners. The FCC's own Advisory Committee on Diversity for Communications in the Digital Age ("FCC Diversity Advisory Committee") acknowledged the inequity in the FCC's decision and issued a resolution in 2009 urging the FCC to reverse the rule changes.[5] The vacation of the rules without

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[4] *Annual Services Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Wireless*, Fourteenth Report, WT Docket No. 09-66, 2010 WL 2020768, at *117 (May 20, 2010) ("CMRS Report").

[5] Federal Communications Commission Advisory Committee on Diversity for Communications in the Digital Age, Resolution Regarding Designated Entity Investment Rules (September 22, 2009) *available at*

any remedy to Petitioners has effectively foreclosed the opportunity for diverse Americans such as those represented by *Amici* – small businesses, and minority and women-owned businesses – from participating in the spectrum auctions and owning spectrum licenses, rendering Section 309(j) meaningless. *Amici*, therefore, respectfully request that this Court grant certiorari to review the Third Circuit's refusal to grant Petitioners any form of relief to remedy the Commission's unlawful actions

ARGUMENT

I. Introduction.

1. The United States Congress has made it explicitly clear that valuable communications spectrum licenses should be owned by a variety of Americans. Specifically, Section 309(j) of the Communications Act of 1934, as amended, commands the FCC, when awarding spectrum licenses through competitive bidding, to

> promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses

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www.fcc.gov/DIVERSITYFAC/recommendations.html. ("FCC Diversity Advisory Committee Resolution") (The FCC Diversity Advisory Committee was created to make recommendations to the FCC regarding policies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries.).

> among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.[6]

2. In response to this 1993 Congressional directive, the FCC has, over the years, implemented rules and initiatives to promote robust participation in spectrum auctions by small businesses, rural telephone companies, and minority and women-owned businesses, known collectively as designated entities, or DEs. These adopted initiatives reflect the Commission's recognition that, "although auctions have many beneficial aspects, *they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women by raising the cost of entry into spectrum-based services.*"[7] Notwithstanding this acknowledgment, the FCC has, over time, dismantled many of the various initiatives it has put in place to ensure diversity among owners of communications properties and spectrum, leaving in place today only bidding credits that reduce the amount qualified DE small businesses pay for spectrum won at auction.

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[6] 47 U.S.C. § 309(j)(3)(B)

[7] *Implementation of Section 309(j) of the Communications Act- Competitive Bidding*, Fifth Report and Order, 9 F.C.C.R. 5532, 5537,(¶10)(1994)("Fifth R&O")(Emphasis added) The Commission also recognized that it must "take the steps that are *necessary to ensure that designated entities have a realistic opportunity* to obtain [spectrum] licenses." *Id.*,(¶9)(emphasis added)

In 2006, merely weeks before one of the largest, most important auctions of public spectrum in history was scheduled to begin, the FCC effectively dismantled this last element of the DE Program without Congressional approval, advance notice, or appropriate deliberation. It did so by abruptly making several changes in its New DE Rules that were manifestly inimical to the interests of DEs.

3. The devastating effects of the New DE Rules were apparent immediately in Auction 66, the very first auction after their adoption by the FCC. Minority and women-owned telecommunications businesses that qualify as DEs are woefully underrepresented in the telecommunications industry.[8] However, instead of making it easier for these groups to compete and be represented as mandated by Congress, the New DE rules did the exact opposite. DEs found themselves unable to retain or arrange financing to bid on Auction 66 licenses that would allow them to compete with entrenched, incumbent providers.[9] Accordingly, with

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[8] Supplemental Joint Appendix ("SJA") to the Third Circuit, 409–11, 557 (No. 08-2036).

[9] Certain DEs (rural telephone companies) were ultimately able to obtain small slices of spectrum to cover their existing geographic service areas Largely shut out were those DEs that sought to pursue a different business model, provision of new services in non-rural, urban markets on a local, regional or nationwide basis to compete with the major incumbent wireless carriers. For this reason, FCC references to the total number of licenses obtained by DEs in auctions since adoption of the New DE Rules obscure the abysmal performance by DEs, including minority and women-owned DEs, who seek to provide new competition to incumbents in areas of high demand. *Compare Statement by FCC Chairman Kevin J. Martin*, FCC

DE participants hobbled, the large incumbents were enabled to consolidate their hold on spectrum and the wireless industry.[10] The damage from the auction only deepened with the very next major auction, Auction 73.[11] Under the New DE Rules, that auction also resulted in huge blocks of valuable and important spectrum, considered the most premium licenses, essentially being sold off carte blanche to the large incumbent wireless carriers.

4. Indeed, DE participation in spectrum auctions, measured by net value of licenses won, plummeted from an average of more than 70% in six major commercial mobile radio service auctions from 1996 to 2005, to 4.0% in Auction 66 and 2.6% in

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News Release (Mar. 20, 2008) (lauding the success of "small businesses" in Auction 73) *with Commissioner Jonathan S. Adelstein Comments on Lack of Diversity Among Winners of the 700 MHz Auction*, FCC News Release (Mar. 20, 2008) ("*Adelstein Release*") (decrying that minority- and women-owned bidders *together* won less than one percent of Auction 73 licenses).

[10] *See* Petitioners' Reply Brief to the Third Circuit 16-21 (No. 06-2943); *see also FCC Spectrum Auction Ends on $13.7 Billion High Note*, RCR Wireless News, Sept. 18, 2006, *available at* http://www rernews.com/apps/pbcs.d11/article?AID=/20060918/SUB.

[11] *See, e.g., Verizon and AT&T Dominate Airwaves Auction*, Reuters Business News, Mar 20, 2008, *available at* http //www reuters com/article/ technologyNews/idUSN2042023420080321?feedType=RSS&feedName=technologyNews (stating that Verizon and AT&T "grabbed the lion's share" of the 700 MHz licenses) (last visited Aug. 13, 2008).

Auction 73.[12] Reviewing the abysmal results of Auction 73, Commissioner Adelstein noted that "women-owned bidders failed to win any licenses and minority-owned bidders won less than one percent of licenses (7 of 1,090 licenses, or .64%)."[13] This result is inexcusable considering "that women constitute over half the U.S. population and minorities around one-third of the U.S. population."[14] Commissioner Adelstein lamented that:

> It's appalling that women and minorities were virtually shut out of this monumental auction. It's an outrage that we've failed to counter the legacy of discrimination that has kept women and minorities from owning their fair share of the spectrum. Here we had an enormous opportunity to open the airwaves to a new generation that reflects the diversity of America, and instead we just made a bad situation even worse.[15]

Commissioner Adelstein's concern has been echoed by the FCC which has continuously recognized that the

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[12] *See* Petitioners' Supplemental Appendix III to the Third Circuit, Tab 1, Exhibits B and E (No. 08-2036).

[13] *Adelstein Release, supra* note 9.

[14] *Id.; see also* SJA, *supra* note 8, at 461 ("auctions continue to disserve minority communities by excluding minority-owned businesses from owning needed licenses; wireless services in minority communications lag behind accordingly.").

[15] *Adelstein Release, supra* note 9.

wireless industry is in desperate need of competition. The FCC's Diversity Advisory Committee stated in its September 22, 2009 resolution that the FCC should consult with it before all auctions so that it could assist the agency to determine whether "overriding public policy goals or other factors warrant limiting the scope of closed licenses and whether such limitations should be balanced by an increase in bid credits."[16] Then, in the CMRS Report, the FCC decided against making a finding that there is effective competition in the wireless industry.[17] These pronouncements demonstrate that the FCC is on notice of the detrimental impact of its decisions. For the Court to not require the FCC to remedy this failure is a matter of great importance to the *Amici*.

II. A Remedy for the FCC's Unlawful Actions Must be Provided in Order To Fulfill Congressional Intent.

A. Fundamental Fairness, Rooted in the Rule of Law, Requires that a Litigant Who Has Demonstrated That An Agency Action Is Invalid Obtain Tangible Relief.

This Court in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), established that if a right is violated, there must be a remedy:

> The very essence of civil liberty certainly consists in the right of every

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[16] *FCC Diversity Advisory Committee Resolution*, *supra* note 5.

[17] *See FCC dings wireless industry on competition*, Fierce Wireless, rel May 20, 2010 (http://www.fiercewireless.com/node/65539) (noting the FCC's summation in presenting the Order to the full Commission).

> individual to claim the protection of the laws, whenever one receives an injury...The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

The Petitioners, as well as DE *Amici* who would have participated in the spectrum auction but for the unlawful New DE Rules, have been shut out of the spectrum ownership. There is uncertainty as to whether in instances as this case, where the harm is severe, a Court should appropriate some sort of remedy.

The lack of uniformity and consistency among the circuits in the formulation of judicial remedies frustrates the public's expectations of the APA's plain language as to the reviewing court's remedial authority over unlawful agency action.

At this time, the country cannot afford for the FCC to shut out competitors. On March 16, 2010, when the FCC released its National Broadband Plan, it acknowledged the transformative role that wireless technology has in society and economic progress.[18] It wrote:

> Spectrum policy must be a key pillar of U.S. economic policy. The contribution

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[18] Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar 16, 2010) *available at* www.broadband.gov.

> of wireless services to overall gross domestic product grew over 16% annually from 1992–2007 compared with less than 3% annual growth for the remainder of the economy. Given these growth rates, wireless communications–and mobile broadband in particular–promises to be a significant contributor to U.S. economic growth in the coming decade.[19]

Three months later, in its CMRS report, the FCC staff noted that there has been a surge in usage of smartphones, pointing out that in 2004, 4 percent of consumer's monthly wireless bills related to wireless data charges; and that in 2008 that number rose to nearly 22 percent. Commissioner Copps expressed his concern over consolidation in the wireless market which has increased 32 percent since 2003, stating, "all of the findings in this report are not comforting."[20]

Without a remedy to ensure that DEs are able to be part of this growing market, there is a risk that the power and the public's assets in spectrum has become increasingly concentrated in the hands of a few. This possible outcome is of grave concern to *Amici* because several DEs have a tradition of serving underserved markets partly because the minority DEs, in particular, have a sense of connection to those communities. Also, because it is

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[19] *Id.* at p.75 (internal citations omitted).

[20] CMRS Report, Statement of Michael J. Copps, *supra* note 4, at *127.

difficult to compete against an incumbent who has brand loyalty, several DEs branch out and focus on some of the communities represented by the Public Interest *Amici*.

The FCC relegated DEs to the sidelines of spectrum auctions, boosting the concentration of entrenched incumbents large and small, while thwarting Congress' call for robust competition and diversity in spectrum auctions. This damage to Petitioners' was recognized by the Third Circuit, however no relief was provided.

B. The Third Circuit Misapplied Section 706 In Violation of the Administrative Procedure Act.

As the Petition for Writ aptly states, the Administrative Procedure Act does not permit the court of appeals to issue an order without appropriating a remedy. The misapplication of Section 706 warrants review in this case because of its detrimental effects on the nation's telecommunications policy. This particular unlawful agency action directly and substantially harmed small business and minority and women-owned business participation in two of the most important spectrum licensing auctions in the history of this country, encompassing vital nationwide, regional, and local licenses that govern the use of vast amounts of very valuable spectrum.[21] CA-JA 168.

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[21] Joint Appendix before the Third Circuit ("CA-JA")(No 08-2036). Commissioner Adelstein characterized Auction 66 as the agency's "most significant auction in 10 years," and referred to the spectrum made available in Auction 73 as "the finest crown jewels the FCC has to put up for auction." *Second Report and Order*, WT Docket No. 06-150, 22 F.C.C.R. 15289, 15564 (2009)

Further, if Section 706 is not applied, *Amici* and their members and constituents would suffer by having a smaller pool of wireless carrier providers from which to select.

Without some form of redress for the harms suffered when the FCC breached its obligation to provide notice and comment, *Amici* would be negatively impacted from the lack of effective competition and the dominance in the wireless industry of a few carriers. Moreover, the Public Interest *Amici* represent communities and members that would have benefitted from a wireless marketplace that included additional DEs, and in particular from those owned by women and minorities. Any action by a court that would further perpetuate acquisition of valuable spectrum by a limited pool of carriers is improper. Failure to provide some sort of remedy in cases such as this one goes against the spirit of Section 706 of the APA. 5 U.S.C. § 706; *Forrest Guardians v. Babbitt*, 74 F. 3d 1178, 1191 (10th Cir. 1999).

C. The Third Circuit's Failure to Grant a Remedy Chills Challenges to the Commission's Unlawful Activities.

The Third Circuit's refusal to disturb flawed administrative actions unlawfully and unduly reduces the public's incentive to challenge agency decisions. It may well also lessen governmental agencies' incentive to carefully craft their regulations in the first instance.

The consequences flowing from such discretionary judicial restraint raise serious public policy issues of concern to *Amici*. When a court

rules, but fails to assign a remedy to the petitioning party, that court is essentially stripping the APA of its effectiveness. This action would have the subsequent effect of diminishing the rights of the public. This is not to say a remedy is mandatory, explicitly for casual inconsequential matters, but for issues with grave consequences as in this case, absence of a remedy is almost unconscionable.

The present refusal to remedy the unlawful act also stands as a deterrent to challenges to even the most blatant agency violations. The decision could also have the chilling effect of deterring future challenges. Substantial time and resources are necessary to challenge an agency decision, but if the courts continue to provide only prospective relief from a rule which application had previously caused substantial harm without unwinding the resulting effects of unlawful actions, the public would be less inclined to speak up when it is harmed by any unlawful agency action. Prospective relief on an ongoing basis fails to adequately address the harm sustained by the unlawful agency action.

Not only are the DE *Amici* manifestly impacted by the divergence among the circuit courts as to the nature and scope of a proper remedy when violations under the APA are found, DE *Amici* also join the Public Interest *Amici* in their national policy concerns regarding the Third Circuit's decision to remand the voided regulation without imposing any additional meaningful remedy.

Another impact of a vacatur without a remedy is that it rewards agencies for their wrongdoing. Such an outcome would be outrageous especially in those cases where the agency purposefully delays

acting in hopes that the complaining party will get frustrated by the time and process and abandon its complaint, or in order to make it difficult for a court to reverse its decision due to the passage of time. Both scenarios are present in this proceeding. The Third Circuit decided against a remedy to reverse the auctions because several incumbents had won spectrum and significantly advanced their build-out of the spectrum won. Therefore, by not mandating a reversal or some other remedy, the court is *de facto* allowing bad action by an agency to stand without retribution.

D. Section 706 Should Have Been Applied in This Case Even if "Equitable Balancing" Is Available To The Court.

The court of appeals found that the Commission's actions in implementation of the New DE rules were seriously flawed. The court's use of "equitable balancing" failed to adhere to congressional intent of the promotion of diverse ownership of spectrum. It also failed to remedy the disparate impact of the unlawful regulations on small, minority and women-owned businesses.

The court of appeals focused on the potentially disruptive consequences of an interim change and held that because of that disruption, or perceived disruption, relief requested by the Petitioners would not be granted. Competing considerations do not appear to have been adequately addressed by the court of appeals. These considerations include the congressional intent to promote ownership of spectrum to a diverse variety of Americans as well as the promotion of

competition. Further, the court of appeals failed to consider the actual irreparable injury to petitioners as well as the DE *Amici*.

The Third Circuit also failed to consider the overall public interest in promoting the success of small and minority and women-owned businesses. These considerations clearly outweigh the potential disruptions on which the court focused. Moreover, the FCC's Diversity Committee warned in 2009 against the agency making a decision that would limit the scope of licensees without taking some other kind of action to counterbalance such limits.[22]

III. The Third Circuit Failed to Sanction the FCC for Its Improper Conduct.

Unless some remedy is imposed when an agency is found to have behaved unlawfully, that agency would be without incentive to adhere carefully to the procedural requirements of the APA, knowing that there is a possibility that if a court finds the agency's conduct unlawful, it will nonetheless decline to set the action aside.

As the New DE Rules were adopted, FCC Commissioner Adelstein accurately worried that the FCC's decisions in the "troubled proceeding" could eventually result in Auction 66 being overturned. *See* CA-JA 168.[23] Thus, in sum, the Commission, or at

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[22] *See FCC Diversity Advisory Committee Resolution, supra* note 5.

[23] *See also* CA-JA 166 (FCC Chairman Kevin Martin expounds his belief that the "last minute" changes were not "needed" but that he agreed to the same to "obtain the support necessary to ensure Auction 66 would be held in the summer of 2006.")

least one of its Commissioners, anticipated a type of remedy that the Court failed to administer. The precedent set by permitting an agency to go forward despite its improper conduct could be disruptive to public policy and goes against notions of equity and fairness.

CONCLUSION

For the reasons stated above, the DE *Amici* and Public Interest *Amici* respectfully ask that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted:

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